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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

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No. 82-5764

RAYMOND L MEDLIN, Appellant Pro Se

V.

CITY & BOROUGH OF SITKA, Appellee

APPEAL FROM THE SUPREME COURT OF ALASKA

Raymond L Medlin
RAYMOND L MEDLIN
BOX 1339
SITKA, ALASKA 99835

28 October 1982

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CITATIONS

Constitution of the United States:

Seventh Amendment

Fourteenth Amendment

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October Term, 1982

No. _____

RAYMOND L MEDLIN, Appellant Pro Se
V.
CITY & BOROUGH OF SITKA, Appellee

APPEAL FROM THE SUPREME COURT OF ALASKA

JURISDICTIONAL STATEMENT

Appellant, Raymond L Medlin, appeals from Alaska Supreme Court order 6904 dated 20 September 1982, denying a petition for review of the Superior Court's denial of a verbal request for jury trial at a pre-trial conference on 26 April 1982, and a written demand for jury trial filed 5 May 1982. The validity of the decision of the Superior Court was drawn in question on the grounds of its being repugnant to the Constitution of the United States Amendment VII, and the Alaska Supreme Court in denying a petition for review upheld the trial court decision denying jury trial as valid.

OPINIONS BELOW

Order of the Superior Court, First Judicial District, dated 28 April 1982.

Order of the Superior Court, First Judicial District, dated

11 May 1982.

Order 6904 of the Supreme Court of Alaska, dated 20 September 1982

Alaska Civil Rules of Court Proceedure:

Rule 38 Jury Trial; (a) Right preserved. The right of trial by jury as declared by section 16, Article I of the constitution or as given by statute of state shall be preserved to the parties inviolate. (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after commencment of the action and not less than 10 days after service of the last pleading directed to such issue. Such demand shall be made in a seperate written document signed by the party making the demand or by his attorney. (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without consent of the parties.

Rule 39 (b) Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

JURISDICTION

On 28 March 1979, appellant filed suit claiming fraud, false arrest, violation of 4th, 5th, 6th, 8th, 9th, 14th Amendments of the United States Constitution, false imprisonment, violation of right to privacy, and injury to reputation, character, honor and good name.

On 26 April 1982, at a pre-trial conference, appellant demanded a jury trial.

On 29 April 1982 the trial court ordered,"trial of this matter be to the court".

On 5 May 1982 appellant moved for reconsideration and filed a written demand for jury trial.

On 12 May 1982 the trial court affirmed the order denying jury trial.

On 8 June 1982 appellant filed a petition for review in the Supreme Court of Alaska.

On 22 July the Supreme Court of Alaska granted the petition for review, order 6904.

On 20 September 1982 the Supreme Court of Alaska denied the petition for review, order 6904.

On 30 September 1982 appellee filed a motion for summary judgment.

A notice of appeal to the Supreme Court of the United States was duly served on 5 October 1982.

This appeal is taken to this court within 90 days from the denial of the petition for review by the Alaska Supreme Court. The jurisdiction of this court is invoked under 28 USC 1257 (2).

QUESTIONS PRESENTED

Is this suit triable of right by jury ?

Were the demands for jury trial duly and timely made on 26 April and 5 May 1982 ?

Did the trial court abuse its discretion in denial of jury trial and in doing so "miscarrage justice" ?

CONSTITUTIONAL PROVISIONS

Amendment VII, United States Constitution

In suits at common law, where the value in controversy

shall exceed twenty dollars, the right of trial by jury shall be preserved...

Amendment XIV, United States Constitution

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RAISING THE FEDERAL QUESTION

Appellant raised the federal question on 5 May 1982 in the trial court in a motion for reconsideration.

Appellant raised the federal question on 8 June 1982 in the Alaska Supreme Court in a petition for review.

STATEMENT OF THE CASE

Appellant demanded a jury trial verbally at the pre-trial conference on 26 April 1982.

Appellant demanded a jury trial in a duly served written motion filed 5 May 1982.

Appellee filed a motion for summary judgment on 30 September 1982.

THE QUESTIONS ARE SUBSTANTIAL

Where a case is triable by jury as a matter of right, the court may not try it without a jury where a demand for a jury trial has been properly made. A demand for a jury if made at the proper time, deprives the court of jurisdiction to try the case otherwise than by a jury. There is nothing in the control which the court posesses over attorneys, as officers of the court, which makes permissible the extension of such control, so as to include litigants and permit the taking from the latter of their right to a jury trial in an action for money, simply because defendant is an attorney. Westerlund vs Peterson 197 Na 110.

It has also been stated that the words "law of the land" or "due process of law" when used in considering the property rights of individuals, means not only summons or notice, such as is ordinarily given upon the institution of a suit, due appearance of the parties in intrest, and pleading of the facts in issue, but also means a determination of the facts by a jury. The right to trial by jury is essential to due process of law. The right of trial by jury covers not only the personal privilege of a single of a single suitor or accused person, but also the intrests of jurors, judges and all citizens, in benefits direct and indirect, which the framers of the constitution believed to be involved in the institution of trial by jury. A court sitting without a jury, where there is a right to a jury trial which has not been waived, has no jurisdiction of the case and its decree is void, the jury being a necessary constituent part of the court itself. Clark vs US 289 US 1; 77 Led 993; 53 S Ct 465; Commonwealth vs Howe 257 Mass 172; 153 NE 537; 48 ALR 762; Ellis vs State 100 Fla 27, 129 So 106, 69 ALR 783. An infringment of the laws in connection with juries require a reversal without reference to whether there is ability to show any injury. The constitutional right to jury trial, where and insofar as it exists, cannot be made a nullity, destroyed, annulled, obstructed, impaired or restricted by judicial action.

The right to have a trial by jury is a fundamental right in our democratic system and is recognized as such in the Magna Charte, the Declaration of Independence, the Federal Constitution and the Alaska Constitution. The Federal Rules of Civil Proceedure also declare that the right of trial by jury must be preserved to the parties inviolate. It is a substantial and valuable right and should not be lightly denied. The right to jury trial is one of subotance, not mere form or proceedure. Diederich vs American News Co. CCA Okl 128 F2d 144. The law favors a trial by jury, and the right to such trial is carefully guarded against infringment and cannot be taken away by implication. The failure to demand a jury does not waive the right to a jury trial where

there is sufficient excuse for the failure. Rules of court should be liberally construed in favor of the demand ; doubt arising on the construction of such rules of court should be resolved in favor of the party asserting his right to trial by jury. The court may allow in its discretion, a demand for a jury trial after the time prescribed where no delay or prejudice to the adverse party would be occasioned, and should do so in such a case where it appears that the delay was without any fault on the part of the party making the demand. The right to a jury trial is not to be sacrificed in the intrest of economy.

The right to trial by jury is highly favored, waivers of the right are strictly construed and not to be lightly inferred or extended by implication, whether with respect to a civil or a criminal case. A finding of a waiver of the right to a jury trial should be hesitatingly made. It follows that a waiver of the right to a jury trial will not be presumed or inferred in the absence of an express agreement or consent. Every reasonable presumption should be made against its waiver. There can be no presumption of a waiver of trial by jury where such a trial is mandatorialy provided by law. In the exercise of discretion in determining whether a late motion for jury trial should be allowed, the courts have considered such questions as whether the motion was made within a reasonable time after the expiration of the time allowed by rule, or at a proper state in the proceeding; whether the failure to make demand for jury trial prescribed by rule was the result of inadvertence, mistake, or excusable neglect as would allow the motion; whether the action was one suitable for trial by jury; and, whether allowing a jury trial would prejudice the rights of the adverse party. As a rule, the waiver of a jury trial must be an intentional act, and the intention to waive must plainly appear. Where modes of waiver provided for by rule are exclusive, a mere failure to demand a jury, where the rule requires that a waiver be entered in the minutes of the court is not a waiver. The general rule is that failure to demand jury trial or properly to give notice that one is des-

ired, within the time provided by rule, constitutes or gives rise to a presumption of waiver of the right to jury trial.

The right to jury trial is immemorial; it was brought from England to this country by the colonists, and it has become a part of the birthright of every free man. The right to have a trial by jury is a fundamental right in our democratic judicial system. It is a right which is justly dear to the American people and should be jealously guarded by the courts. Any seeming curtailment of this right should be scrutinized with the utmost care.

Justice is nothing more or less than a determination of rights under the applicable rules of law; and its giving or the administration of justice is the object or the end of the law; and justice is that end which ought to be reached in a case by the regular administration of the principles of law involved as applies to the facts. The phrase "miscarrage of justice" does not merely mean that a guilty man has escaped or that an innocent man has been convicted; but, is applied to thoes situations where some form of trial in which essential rights of the people or defendant were disregarded or denied.

CONCLUSION

For the above reasons, this Court should note jurisdiction of this appeal.

Respectfully submitted,

Raymond L Kedlin
Box 1339
Sitka, Alaska 99835

28 October 1982

APPENDIX

Superior Court order dated 26 April 1982 i
Motion for Reconsideration ii
Demand for Jury Trial iii
Superior Court order dated 11 May 1982 iv
Petition for Review v
Supreme Court of Alaska order 6904 vi
Supreme Court of Alaska order 6904 vii
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT SITKA

rcvd 10-8-82

RAYMOND L MEDLIN
Appellant

V

CITY & BOROUGH OF SITKA
Appellee

No. 1SI 79 86CIV
Order 6904

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Raymond L Medlin, the appellant abovenamed, hereby appeals to the Supreme Court of the United States from the order of the Supreme Court of the State of Alaska, order 6904 entered 20 September 1982 denying a petition for review.

This appeal is taken pursuant to 28 U.S.C., section 1257.

Raymond L Medlin

Raymond L Medlin
Box 1339
Sitka, Alaska 99835

ply filed original Rec to AK Supreme Ct

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

RAYMOND L. MEDLIN,

Plaintiff,

vs

CITY AND BOROUGH OF SITKA,

Defendant.

No. 1SI-79-86 CIV

FILED in the Trial Courts
State of Alaska, First District
Sitka

APR 29 1982

Clerk of the Trial Courts
By _____ Deputy

ORDER

It appearing that no jury trial has been demanded as required by Civil Rule 38(b) and this requirement has not been waived by defendant, now therefor

IT IS HEREBY ORDERED that the trial of this matter be to the court.

ISSUED this 28 day of April, 1982.

Duane Craske
Superior Court Judge

CERTIFICATION

The undersigned certifies that on the 29 day of April, 1982 a true copy of the document was mailed to the following attorneys:

Raymond L. Medlin

M. I. Thomas, Esq.

BY _____

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT SITKA

Raymond L Medlin
Plaintiff

V.

City and Borough of Sitka
Defendant

FILED in the Trial Courts
State of Alaska, First District
Sitka

MAY 5 1982

Clerk of the Trial Courts

By _____ Deputy

No. 1JI 79 86 Civ

MOTION FOR RECONSIDERATION
CR 77(m)

Plaintiff moves to reconsider the order of 29 April 1982 setting trial by court instead of trial by jury; and accept the accompanying demand for jury trial.

Raymond L Medlin

Copy this document
mailed to Robert Boyd
Hill, Juneau, Alaska
99802, on ___ May 82
by _____.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT ITTA

FILED in the Trial Courts
State of Alaska, First District
Ittа

MAY 5 1982

Clerk of the Trial Courts

By _____ Deputy

Raymond L Redlin
Plaintiff

vs.

City & Borough of Sitka
Defendant

No. 1J1 79 86Civ

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S DEMAND FOR JURY TRIAL

Plaintiff was not aware of the change of Civil Rule 38, enacted effective 1 June 1981.

Plaintiff believed the demand for jury trial was made at the scheduled conference as in the case 1J1 79 86CIV.

Plaintiff has not filed a last pleading in the case.

Defendant stated at the conference that it has not made its last pleading in the case.

The right to trial by jury as declared by section 16, article I shall be preserved to the parties inviolate.

Defendant shows no harm or prejudice for trial by jury.

_____
Raymond L Redlin

Copy this document
mailed to Sitka, Box
1J1, Juneau, AK 99802
on _____ by Deputy

_____

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

FILED in the Trial Courts
State of Alaska, First District

MAY 5 1982

Clerk of the Trial Courts

By _____ Deputy

Raymond L Wedlin
Plaintiff

vs.

City & Borough of Sitka
Defendant

No. 1JI 79 86 Civ

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury on this action.

It is estimated that 4 days will be required for the trial of this action.

DATED this 5th day of May 1982.

Raymond L Wedlin

I hereby certify that a copy of this document was mailed to all counsel of record on May 5, 1982.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

RAYMOND L. MEDLIN,

Plaintiff,

vs

CITY AND BOROUGH OF SITKA,

Defendant.

No. 1SI-79-86 CIV

FILED in the Trial Courts
State of Alaska First District
SITKA

MAY 12 1982

Clerk of the Trial Courts

By _____ Deputy

ORDER

At the April 26, 1982 hearing on a scheduling conference order the court noted the absence of a timely demand for a jury trial. Defendant stated its objection to any jury trial. The court on April 26, 1982 set the matter on for trial to the court. Plaintiff has moved for a reconsideration of this order, now therefor

IT IS HEREBY ORDERED that the order denying the jury trial is affirmed.

ISSUED this 11 day of May, 1982.

Duane Craske
Superior Court Judge

CERTIFICATION

The undersigned certifies that on the 12 day of MAY, 1982 a true copy of the document was mailed to the following attorneys

RAYMOND L. MEDLIN

M. T. THOMAS, ESQ.

BY Donna Stanup

Best Copy Available

IN THE DISTRICT COURT IN AND FOR [illegible]
FIRST JUDICIAL DISTRICT OF IDAHO

[illegible],
Petitioner,
v.
[illegible]
Respondent.

No. [illegible]

[illegible]

[illegible]
First Judicial District)

[illegible]. I am [illegible] petition for review. I am unable to [illegible] have worked for [illegible]. I am currently unemployed. I [illegible] been working with a laborer's [illegible]. I [illegible] laborer with Nick Construction for five years; [illegible] lack of work, shortage of [illegible], on [illegible] I was laid off from my job as a laborer with Associated [illegible] five days not terminated for lack of work, eligible for [illegible] I have not refused any job offer. I have exhausted unemployment compensation in the amount of $[illegible] per week. My child support payments of $125 per month are overdue. [illegible] will derive credit and dependants of food, clothing, [illegible]. I have no stock or cash assets, or interest in valuable property.

[illegible] this ___ day of June 1989.

[illegible]

[illegible] to before me this ___ day of June 1989.

[illegible]
Notary Public for Idaho
My commission expires: _____

Best Copy Available

Petitioner

v.

Respondent

No. [illegible] Civil

[illegible]

[illegible] Petitioner seeks [illegible] review an order of the superior court [illegible] jury trial. [illegible] will result in substantial [illegible] trial; and the issue [illegible] important public interest [illegible] the petition is not granted on an important question of law.

On 28 April 1972, at the scheduling conference the petitioner asked for a jury trial. Respondent consented to jury trial without giving a reason. The court [illegible] trial by court. Petitioner petitioned for reconsideration of the order and for trial by jury. On [illegible], the court affirmed the order denying trial by jury.

Thus the requirement of the Alaska rules of court, civil rule 38(b), be used as the basis for denial of the unwaived right to trial by jury as provided for by United States Amendment VII and the Alaska Constitution, article I section 16.

Postponement of review until appeal may be taken from fin-

Best Copy Available

A judgment will result in impairment of the invisible local right to a civil trial by jury in the State of Alaska for amounts exceeding $250, and a common law suit in the United States for value exceeding $20. Without an immediate decision by the appellate court, the issue of federal and state local right versus the rules for Court, might otherwise evade review. The order involving denial of a trial by jury, is an important question of federal and state local rights. The public interest in jury trial will be advanced by an immediate review. The local right to a jury trial ought to be conserved if the petition is not granted.

Petitioner requests the case be tried to jury.

_____

Signature of petitioner
Box 1154
Kodiak, Alaska 99615

I have sent a copy this
document mailed to ...
[illegible], and will, [illegible]
[illegible] on ___ day by

_____.

Best Copy Available

Petitioner

v.

Respondent

No. [illegible]

Order

Upon motion to dismiss the petition for review by petitioner

[illegible]

It is so ordered this ___ day of [illegible], at Washington, D.C.

Please send copy this document
[illegible]
[illegible] on ___ [illegible] by

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Filed and Entered

APPELLATE COURTS of the
STATE of ALASKA

JUL 9 1982

ROBERT D. BACON CLERK

By Deputy

IN THE SUPREME COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT SITKA

Filed in the Trial Courts

By Deputy

RAYMOND L MEDLIN
Petitioner

VS

CITY & BOROUGH OF SITKA
Respondent

6904

No. 1SI 79 86CIV

ORDER

The motion to accept the petition for review by petitioner is ~~affirmed~~ granted.

Dated this 7th day of ~~June~~ July 1982, at Anchorage, Alaska. Entered at the direction of Justice Compton. Response to the petition for review is due on or before July 22, 1982.

Carol L. Vance
Deputy Clerk of the Supreme Court

Witnessed copy this document
mailed to M.T.Thomas, box 1211
Juneau 99802 on 7 June 82 by
Tanya Young.

Filed and Entered 9/20
APPELLATE COURTS of the
STATE of ALASKA

SEP 20 1982

ROBERT D. BACON CLERK

By Deputy

IN THE SUPREME COURT OF THE STATE OF ALASKA

RAYMOND L. MEDLIN,

Petitioner,

vs.

CITY & BOROUGH OF SITKA,

Respondent.

Supreme Court No. 6904

O R D E R

Superior Court No. 1SI 79-86 Civil

Before: Burke, Chief Justice, Rabinowitz, Connor, Matthews and Compton, Justices.

On consideration of the petition for review lodged June 8, 1982 and filed July 9, 1982, and the response to the petition filed July 19, 1982,

IT IS ORDERED:

The petition for review is denied.

Entered by direction of the court at Anchorage, Alaska on September 20, 1982.

CLERK OF THE SUPREME COURT

ROBERT D. BACON

ccs: Justices
Counsel
The Honorable Duane Craske
Clerk of Court, Sitka

FILED in the Trial Courts
State of Alaska, First District

OCT 17 1979

Clerk of the Trial Courts

By _____ Deputy

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[illegible]

[illegible] 1) [illegible] 2) [illegible] 3) [illegible] 4) [illegible] 5) [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] (.75,000).

Raymond R Wheeler

[illegible]

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FILED in the Trial Courts
State of Alaska, First District
Sitka
MAR 28 1979
Clerk of the Trial Courts
By: _____ Deputy

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT SITKA ALASKA
FIRST DISTRICT

RAYMOND L. BALDIN
PLAINTIFF

VS.

THE CITY AND BOROUGH OF SITKA
DEFENDANT

CASE NO. 1SI-79-86Civ

COMPLAINT

COMES NOW THE PLAINTIFF FOR CAUSE OF ACTION WITH RIGHT OF ACTION AND JURIS ET DE JURE AS FOLLOWS (JURIS AFFECTUS IN EXECUTIONE CONSISTIT) :

I

SUIT IS HEREBY BROUGHT AGAINST DEFENDANT FOR FRAUD TO WIT DID DELIBERATELY OR WILLFULLY DEVICE TO DEPRIVE PLAINTIFF OF RIGHT AND IN SUCH MANNER DID UPON HIM INJURY.

II

DEFENDANT DID FALSELY ARREST PLAINTIFF TO WIT UNLAWFULLY PHYSICALLY RESTRAIN PLAINTIFF OF HIS LIBERTY.

III

DEFENDANT DID DEPRIVE PLAINTIFF OF HIS NATURAL RIGHT TO LIBERTY AND FAILED TO IT THE XIV (14th) CONSTITUTIONAL AMENDMENT AND THE IX (9th) CONSTITUTIONAL AMENDMENT.

IV

DEFENDANT DID VIOLATE PLAINTIFF'S CIVIL RIGHT TO PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT TO WIT THE VIII (8th) CONSTITUTIONAL AMENDMENT.

V

DEFENDANT DID CAUSE UPON PLAINTIFF FALSE IMPRISONMENT.

VI

DEFENDANT DID VIOLATE PLAINTIFF'S RIGHT OF PRIVACY TO WIT TO WITHOLD HIMSELF AND HIS PROPERTY FROM PUBLIC SCRUTINY.

VII

DEFENDANT DID VIOLATE PLAINTIFF'S REPUTATION TO HIT INJURED AND HONOR CHARACTER AND GOOD NAME.

VIII

DEFENDANT DID VIOLATE PLAINTIFF'S CHARACTER TO HIT HIS MORAL QUALITIES WHICH BELONG TO AND DISTINGUISH AN INDIVIDUAL PERSON.

IX

DEFENDANT DID VIOLATE THE IV(4th) AMENDMENT TO THE CONSTITUTION.

X

DEFENDANT DID VIOLATE THE V (5th) AMENDMENT TO THE CONSTITUTION.

XI

DEFENDANT DID VIOLATE THE VI (6th) CONSTITUTIONAL AMENDMENT.

XII

DEFENDANT DID VIOLATE THE VIII (8th) CONSTITUTIONAL AMENDMENT.

XIII

DEFENDANT DID VIOLATE THE IX (9th) CONSTITUTIONAL AMENDMENT.

XIV

PLAINTIFF ASKS FOR JUDGEMENT RELIEF IN AMOUNT OF $2,000,000, (TWO MILLION DOLLARS).

Raymond L Nollin

RAYMOND L NOLLIN
THE RIGHT GOOD AND LAWFUL
UNITED STATES OFFICER
BOX 1339
SITKA ALASKA 99835

82-5764

Office-Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER L. STEVAS,
CLERK

Case No.:_____

United States Supreme Court

October, 1982

Raymond L. Medlin, Appellant

v.

City & Borough of Sitka, Appellee

On Appeal from the Supreme Court
of the State of Alaska

Motion to Dismiss Appeal

Michael T. Thomas, Esq.
ROBERTSON, MONAGLE,
EASTAUGH & BRADLEY
P. O. Box 679
Anchorage, AK 99510
(907) 277-6693

Case No.:_____

United States Supreme Court

October, 1982

Raymond L. Medlin, Appellant

v.

City & Borough of Sitka, Appellee

On Appeal from the Supreme Court
of the State of Alaska

Motion to Dismiss Appeal

Michael T. Thomas, Esq.
ROBERTSON, MONAGLE,
EASTAUGH & BRADLEY
P. O. Box 679
Anchorage, AK 99510
(907) 277-6693

TABLE OF AUTHORITIES

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Wilson v. Corning Glass Works, 195 F.2d 825 (9th Cir. 1952).....	4

UNITED STATES SUPREME COURT

RAYMOND L. MEDLIN,	)
	)
Appellant,	)
	)
vs.	)
	)
CITY & BOROUGH OF SITKA,	)
	)
Appellee,	)
	)

MOTION TO DISMISS APPEAL

COMES NOW appellee, City and Borough of Sitka, defendant in the trial court, and, by and through its counsel, Robertson, Monagle, Eastaugh & Bradley, moves to dismiss the appeal filed by Raymond Medlin.

Appellant filed a complaint in the Superior Court for the State of Alaska, First Judicial District, on March 29, 1979. More than three years later, on April 26, 1982, appellant made a verbal request for a jury trial. Defendant objected. On April 26, 1982, the court set the matter for trial before the court, noting the absence of a timely demand for

a jury trial. A written demand for a jury trial was made on May 5, 1982. On May 11, 1982, the Superior Court, per Judge Craske, affirmed its order denying jury trial.

Appellant petitioned the Supreme Court of the State of Alaska for review of the order affirming denial of a jury trial. The petition for review was denied. Alaska Supreme Court Order 6904, dated September 20, 1982. It is this order from which appellant appeals.

The Seventh Amendment preserves the right to a jury trial, but this right may be waived by the parties. Colgrove v. Battin, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1972); United States v. Moore, 340 U.S. 616, 71 S.Ct. 524, 95 L.Ed. 582 (1951); Kearney v. Case, 12 Wall. 275, 281, 20 L.Ed. 395 (1870).

Rule 38(b), Alaska Rules of Civil Procedure, provides:

> **DEMAND.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand shall be made in a separate written document signed by the party making the demand or by his attorney.
>
> Rule 38(d) provides:
>
> **WAIVER.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him or trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

The Rule thus requires an affirmative demand for a jury trial within the time period set forth.

In the case at bar, appellant did not make a timely demand for a jury trial, nor has appellant made a showing in the trial court, the Supreme Court of the State of Alaska, or in this Court of any reason that such failure should be excused. Appellant has thus waived any

right to a jury trial. Krodel v. Houghtaling, 468 F.2d 887 (4th Cir. 1972), cert. denied, 414 U.S. 829, 38 L.Ed.2d 64, 94 S.Ct. 57 (1973); Wilson v. Corning Glass Works, 195 F.2d 825 (9th Cir. 1952); United States v. Moore, supra, on remand, Moore v. United States, 196 F.2d 906 (5th Cir. 1952). (Although the above cases interpret the Federal Rules of Civil Procedure, Rule 38(b) and (d), Alaska Civil Rule 38(b) and (d) is similarly worded.) See also Ward v. Brown, 301 F.2d 445 (10th Cir. 1962): an oral application for permission to file a written demand for a jury trial does not comply with the rule requiring that the demand be served ten days after service of the last pleading directed to the issues.

Furthermore, the question presented in this appeal is moot. On November 2, 1982, the Superior Court for the State of Alaska, First Judicial District, per Judge Craske, granted

appellee's Motion for Summary Judgment and dismissed plaintiff/appellant's complaint. See copy attached. Thus, there will be no trial, either by court or by jury.

Since appellant's waiver of its right to a jury trial was effective, and since in any event the issue is moot, the appeal in this case should be dismissed.

Respectfully submitted this 22nd day of November, 1982.

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY

By _____
Michael T. Thomas
Of Attorneys for Appellee
City and Borough of Sitka

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY
ANCHORAGE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

RAYMOND L. MEDLIN,

Plaintiff,

vs

CITY AND BOROUGH OF SITKA,

Defendant.

FILED in the Trial Courts
State of Alaska, First District

NOV 2 1982

Clerk

By _____ Deputy

No. 1SI-79-86 CIV

ORDER OF DISMISSAL

Defendant has moved for a summary judgment and plaintiff has opposed. On November 1, 1982 the court's findings of fact and conclusions of law were orally entered on the record, now therefor

IT IS HEREBY ORDERED:

1. That defendant's motion for summary judgment is granted and the complaint is dismissed.

2. That Civil Rule 79 application for costs shall be made within ten (10) days.

3. That Civil Rule 82 application for attorney fees shall be made within ten (10) days.

ISSUED this 2 day of November, 1982.

Duane Craske
Superior Court Judge

CERTIFICATION

The undersigned certifies that on the 3 day of NOVEMBER, 1982 a true copy of the document was mailed to the following attorneys:

MICHAEL T. THOMAS, ESQ.
RAYMOND L. MEDLIN
BY [signature]

Cal 11/9/15

Alaska Court System
State of Alaska